BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD EPPERLY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,041,146
JIM COMBES D/B/A JC CONSTRUCTION	)	
Uninsured Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals the October 8, 2008, preliminary hearing Order of Administrative Law Judge Brad E. Avery (ALJ). Claimant was denied benefits after the ALJ determined that respondent did not meet the $20,000.00 minimum payroll threshold under K.S.A. 44-505(a)(2) and (3), nor could it reasonably be estimated that respondent would meet said threshold for the remainder of 2008.

Claimant appeared by his attorney, Derek R. Chappell of Ottawa, Kansas. Respondent appeared by its attorney, Stanley R. Ausemus of Emporia, Kansas. The Kansas Workers Compensation Fund (Fund) appeared by Michael C. Helbert of Emporia, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of James Combes' deposition taken September 24, 2008, with attachments; Tonya Carson's deposition taken September 24, 2008, with attachments; the transcript of Preliminary Hearing held October 3, 2008, with attachments; and the documents filed of record in this matter.

ISSUE

Did respondent's payroll meet the $20,000.00 threshold under to K.S.A. 44-505(a)(2) and (3), thus causing the Kansas Workers Compensation Act to apply to his claim against respondent for the injury occurring on July 10, 2008?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant, a laborer, was working for respondent as an employee on July 10, 2008, when he fell off a roof on which he was helping to replace shingles. Claimant suffered an injury to his left wrist, resulting in surgery with orthopedic surgeon Richard Rattay, M.D., of Emporia, Kansas. At the time of the preliminary hearing, claimant remained under the care of Dr. Rattay. That claimant suffered an accidental injury which arose out of and in the course of his employment with respondent is not disputed. What is in dispute is whether respondent meets the $20,000.00 annual salary minimum set by K.S.A. 44-505(a)(2) and (3).

Claimant did not originally work for respondent as an employee. In 2007, claimant worked for respondent as an independent contractor. Claimant was not provided an IRS form 1099 for the year 2007, as he failed to earn over $6,000.00 for the entire year with respondent. As respondent's work is seasonal, claimant was not employed in the winter of 2007 and early 2008. At that time, claimant worked for Dolly Madison, in Emporia, Kansas. However, at approximately the beginning of May 2008, claimant again contacted respondent about employment. This time, when claimant went to work for respondent, he was hired as an employee and was required to fill out a W-4, with respondent taking out taxes from claimant's salary. This change from independent contractor to employee also applied to respondent's other employees. Claimant was paid $10.00 per hour for respondent. By the time of claimant's accident, he had earned $2,210.00 working for respondent. Also, at the time of the accident, respondent did not have workers compensation insurance.

Respondent worked as a handyman and occasionally as a roofer. In 2006 and 2007, he hired his workers as independent contractors. He withheld no taxes and provided form 1099s for those who qualified. However, in April or May, 2008, he changed the arrangement and began hiring employees instead of independent contractors. He required his employees to fill out W-4s and began taking out taxes from their salaries. At the time respondent began making the change in employment status, he also contacted the Copeland Insurance Agency (Copeland) in Manhattan, Kansas, about obtaining workers compensation insurance. However, due to a tornado hitting Manhattan, the insurance application was delayed and the insurance was not available at the time claimant suffered his injuries in July. Contained on the application form from Copeland is a designation of total payroll. This column shows a total of $20,000.00 as the expected annual payroll. This form was not filled out by respondent, but was signed by him. Shortly thereafter, respondent obtained workers compensation insurance through Copeland. Respondent acknowledges that he knows he does not need workers compensation insurance if his

payroll is below $20,000.00 per year, but continues to carry the coverage regardless of the fact he alleges his payroll does not come close to the required figure. Respondent states he left the $20,000.00 figure on the application because his insurance agent told him he had to.

Respondent testified that his business is that of a handyman with roof repair done in the summer time. His employees are not guaranteed 40 hours per week and he will only call those workers he needs for a specific job. During the year 2007, respondent paid employees a total of $6,753.00 in wages. No taxes were taken from those wage payments. Respondent was advised to change his procedure and, in 2008, began employing workers and withholding taxes from their pay. As of the time of his deposition on September 24, 2008, respondent had paid $9,931.00 in wages with only one more roof job remaining for the year. That job was estimated to take two days and earn respondent about $200.00.

Respondent testified that the pool he belongs to for workers compensation insurance purposes bases his monthly premium on his actual payroll. He uses his ledger to figure the payroll each month and mails the premium to the Kansas Builders Industry Fund.[1] Respondent would not pay $20,000.00 in wages for the year 2008. Respondent's gross income for 2007 was around $77,000.00, with a net to respondent of approximately $21,000.00. When he testified in September 2008, respondent estimated that his gross for the year 2008 would probably be around $60,000.00, with a net to respondent of $18,000.00 to $20,000.00. Respondent agrees he has paid payroll of $9,931.00[2] during a five-month period leading up to his deposition, and if he had paid wages at that rate for an entire year, his payroll would exceed $20,000.00. However, respondent noted that no wages were paid for the months of January, February and March 2008.

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[1] At his deposition, Mr. Combes testified that it was "Kansas Builders Workmen's Comp Fund." (Combes Depo. at 32.) At the preliminary hearing, he testified that it was "Kansas Builders Industry's Fund." (P.H. Trans. at 54.) What is probably being referred to here is the Kansas Building Industry Workers Compensation Fund.

[2] At his deposition, Mr. Combes testified that the amount was $8,761.00, and then later in his testimony he testified that it was $9,931.00. (Combes Depo. at 58 & 61.) At the preliminary hearing, Mr. Combes testified that respondent had paid $9,822.00. (P.H. Trans. at 52.)

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

K.S.A. 44-505(a) states in part:

> Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
> . . .
> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection.[5]

The ALJ denied claimant benefits after finding that respondent did not meet the $20,000.00 salary threshold, nor could it reasonably be established that he would meet the threshold for the remainder of 2008. This Board Member agrees with that finding. Respondent's owner, James Combes, testified to the amounts of salary paid for the year 2007 and the amounts of salary paid through his deposition for the year 2008. In neither case do the amounts approach the $20,000.00 threshold required by the statute. The only evidence supporting claimant's position is contained on the application form from Copeland. That discrepancy is explained by respondent and by respondent's girlfriend, Tonya Carson. The explanation of both is credible.

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[3] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 44-505.

Obviously, respondent intended to provide workers compensation insurance for his workers, but, due to matters beyond his control, that insurance did not take effect until after claimant's accident. While this result is harsh, the language of the statute is clear.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Respondent does not meet the $20,000.00 salary threshold for the preceding year of 2007, and it could not be estimated that respondent would meet the $20,000.00 salary threshold for the year of 2008. Therefore, the denial of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Brad E. Avery dated October 8, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2009.

HONORABLE GARY M. KORTE

c: Derek R. Chappell, Attorney for Claimant
Stanley R. Ausemus, Attorney for Respondent
Michael C. Helbert, Attorney for the Fund
Brad E. Avery, Administrative Law Judge

[6] K.S.A. 44-534a.